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Issue Date: 01 April 2003

CASE NO.: 2003-AIR-0011
File No.: 1-0120-03-003

In the Matter of

CLIFFORD J. WILLIAMS
Complainant

v.

UNITED AIRLINES
Respondent

ORDER ON MOTION

This matter arises from a complaint of discrimination filed by Clifford Williams ("Complainant") against United Airlines ("Respondent") under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. Section 42121. By letter dated December 6, 2002, the Occupational Safety and Health Administration ("OSHA") declined to investigate the complaint of Mr. Williams because it was not timely filed, and provided an opportunity for appeal of that decision. By letter dated January 13, 2003, OSHA's Regional Administrator referred the appeal of the Complainant to the Office of Administrative Law Judges, with a finding that the appeal had been timely filed.

The matter was set for hearing in Boston, Massachusetts on March 5, 2003. On February 11, 2003, the Respondent filed a "MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY ALL PROCEEDINGS PURSUANT TO THE AUTOMATIC STAY PROVISIONS OF THE FEDERAL BANKRUPTCY CODE." By order issued February 20, 2003, I continued the hearing without date and provided until March 7, 2003 for responses to the Respondent's motion. By further order issued March 5, 2003, I extended the date for responses to March 21, 2003. On that date, I received a pleading in opposition to Respondent's motion, and an affidavit of Clifford J. Williams, the Complainant. On March 27, 2003, I received Respondent's Motion for Leave to File Reply in Support of Motion to Dismiss or Stay All Proceedings, and Respondent's reply to Complainant's opposition. In the interests of justice, I will grant Respondent's motion for leave to file a responsive pleading, and I will consider that pleading in deciding this order.

Respondent argues first that the complaint should be dismissed because the Complainant was required, under the provisions of AIR 21, to file his complaint within 90 days of the alleged violation, which in this case was his termination in June, 2000. [1] In fact, Respondent states that the Complainant did not file his complaint until November 15, 2002, more than two years after his termination from employment. Respondent cites numerous cases in support of its position that procedural requirements in statutes are to be taken seriously. Here, the Respondent argues that there is no question that the complaint was not timely filed. It further suggests that the Department of Labor consequently has no jurisdiction over the claim, and that its further pursuit would be a waste of time and resources.

Alternatively, the Respondent argues that the Department of Labor is required to stay these proceedings pursuant to the automatic stay provisions of the U.S. Bankruptcy Code. 11 U.S.C. § 362(a). Respondent filed a Suggestion of Bankruptcy along with its motion. Section 362(a) provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title. . .operates as a stay, applicable to all entities, of (1) the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a).

Respondent maintains that the instant case clearly falls within the scope of "judicial" and "administrative" cases subject to the automatic stay. Respondent calls attention to a recent administrative law judge's decision in Sassman v. United Airlines, 2001 AIR - 0007, where the Judge found that a complainant's AIR 21 appeal is subject to the automatic stay provisions of § 362(a) and is not subject to any of the exceptions thereto contained in 11 U.S.C. § 362(b)(4) [2], because an AIR

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[1] "A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination." 49 U.S.C. § 42121(b)(1).

[2] This provision of the Bankruptcy Code provides that commencement of a bankruptcy case does not operate as a stay:

> of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

21 complainant is not a governmental unit [acting] to enforce such governmental unit's police or regulatory power.

Complainant responded in opposition to the Respondent's Motion. As to the motion to dismiss, Complainant cites to Taylor v. Express One International, 2001 AIR 2 (ALJ Nov. 21, 2001), where an administrative law judge denied a motion to dismiss under claimed similar circumstances, reasoning that time limitation provisions in like statutes are analogous to statutes of limitation that may be tolled by equitable considerations. Here, in support of his position that the motion to dismiss should be denied, Complainant offers an affidavit in which he describes extensive contact with the Federal Aviation Authority ("FAA") where it is argued that he presented his claim. Complainant further contends that there is an insufficiency of uniform procedures in perfecting whistleblower claims, and a lack of substantive information for potential whistleblower claimants. These factors, it is suggested, constitute grounds for equitable tolling of the statutory time limitation for filing a claim under AIR 21.

As to the request for a stay, Complainant cites to Hafer v. United Airlines, Inc. ALJ Case No. 2002-AIR-5, where OSHA filed an amicus brief with the Administrative Review Board ("ARB") contending that the police and regulatory power exception to the automatic bankruptcy stay is applicable to the conduct of AIR 21 administrative proceedings at any stage. The OSHA brief conceptualizes the Secretary of Labor's exercise of her police and regulatory power under AIR 21 as a process that begins with an OSHA investigation and is intended to culminate in a final order by the Secretary. OSHA argues in this brief that the Secretary is therefore exercising her police and regulatory power continuously during the entire administrative process. Following this logic, the procedural posture of a particular case would be of little import in deciding the merits of a stay request, because the entire administrative process [3] is encompassed within the exercise of the police and regulatory power of the Secretary.

Complainant also cites to two recent cases involving similar facts where the administrative law judges found that the exception to the automatic stay provisions of the Bankruptcy Code at 11 U.S.C. § 362(b)(4) applies to administrative proceedings under AIR 21. In Hintz v. United Airlines, Case No. 2003-AIR - 00009, Administrative Law Judge Etchingham presented a thorough analysis of the applicable law and facts in his case and determined that the exception applied. In Briggs v. United Airlines, 2003-AIR- 00003, Administrative Law Judge Pulver adopted the rationale and decision of Judge Etchingham's Hintz order, and found that the exception to the stay applied to the facts of his case.

In reply, Respondent argues that the Complainant has failed to meet any of the three well-accepted situations for granting equitable tolling: (1) when the defendant has actively misled the

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11 U.S.C. § 362(b)(4).

[3] Including, as is the case here, an administrative law judge's hearing on appeal from a dismissal by OSHA without investigation, or, as in Hafer, review of an administrative law judge's decision by the Administrative Review Board.

plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) when the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Ilgenfritz v. U.S. Coast Guard Academy ARB Case No. 9-066, 2001 WL 1031634 at *5 (ARB Aug. 28, 2001). Respondent contends that the Complainant does not allege active misleading, has not been prevented from asserting his rights, and has not raised the precise statutory claim in another forum. Respondent further sees no similarity of this case to Taylor, cited by the Complainant, because, respondent argues, in the Taylor case, the issue centered upon the complainant's assertion that he had filed timely, whereas here, the Complainant has admitted he did not file the complaint with OSHA until November 15, 2002, over two years after his date of termination. Complainant's alleged contacts with the FAA, Respondent argues, failed to raise a claim of retaliation, but, instead, simply brought alleged violations to the attention of the FAA.

In reply to the stay arguments, Respondent calls attention to a recent decision by an administrative law judge in Pohl v. United Airlines, 2003-AIR-16 (ALJ March 4, 2003). In Pohl, Judge Leland found that Section 362(b)(4)'s "governmental unit" exception to the automatic stay provisions did not apply, because, as in Sassman, he found the case to be an appeal by a private citizen of the Secretary's findings in favor of the respondent, with no Department of Labor participation. Respondent also notes that in Briggs and Hintz, where the exception was granted, there was evidence of active Departmental involvement. That involvement is missing here, Respondent argues.

Discussion and conclusion

The stay application

A review of precedent before the Hintz, Briggs, and Pohl cases and the Secretary's brief in Hafer, disclosed that proceedings that did not have a governmental entity as the moving force generally were found to be private actions subject to the automatic stay provisions of the U.S. Bankruptcy Code, whereas those cases that were prosecuted by a governmental unit, or where a governmental unit could be inferred as the enforcing instrumentality, were found to be within the exception at Section 362(b)(4). For example, in Torres v. Transcon Freight Lines, 90-STA-29 (Sec'y Jan. 30, 1991), the Secretary had found the complaint without merit, and was absent from the proceeding when it was determined that the automatic stay provisions of Section 362(a) applied and stayed the proceeding (but did not operate as a dismissal). But in a case like Asst. Sec'y. & O'Daugherty v. Bjarne Skjetne, Jr. d/b/a Bud's Bus Service, 94 STA-17 (Sec'y Mar. 16, 1995), it was determined that complaints pursued by the Department of Labor to enforce its regulatory authority under the Surface Transportation Assistance Act of 1982 ("STAA"), 49 U.S.C. app. § 2305 (1982), should be deemed proceedings by a governmental unit enforcing its regulatory power and, therefore, eligible for the exemption at Section 362(b)(4).

In Bodine v. International Total Services, 2001 AIR 21-00004 (Nov. 20, 2001), an appeal in an AIR 21 whistleblower case was dismissed as untimely, but the administrative law judge found, in *dicta* that the automatic stay provisions of the U.S. Bankruptcy Code were inapplicable to the

complaint since the Department of Labor's action in finding merit to the substance of the complaint was "within its regulatory power to protect and promote our national air safety policy and constitutes 'proceedings by a governmental unit' within the meaning of the automatic stay exemption." *Id*. Judge Burke in Bodine cited to Nelson v. Walker Freight Lines, Inc., 87-STA-24 (Sec'y July 26, 1988), where the Secretary found that the automatic stay provisions did not apply to proceedings under a similar statute because whistleblower actions were proceedings by a governmental unit even though they did not require the filing of a complaint by a federal governmental entity.

In Bodine and Nelson, the procedural postures were such that it was presumed that these whistleblower cases were being pursued by a governmental entity enforcing regulations that protect public health and safety, even though they did not necessarily involve the filing of a complaint by a governmental entity. In Bodine, the complaint had been investigated under AIR 21 and found to have merit, and the Department of Labor had filed a notice of appearance. This was determined to be sufficient governmental involvement for the case to be deemed a proceeding by a governmental unit within the meaning of the automatic stay exemption provision. Bodine, mimeo at p. 5.

In Nelson, a proceeding under the STAA, the Secretary found that even though the Section 2305 action did not require the filing of a complaint by a federal administrative agency, that whistleblower action was nonetheless a proceeding by a government unit within the meaning of the automatic stay exemption of the U.S. Bankruptcy Code because the action was taken to enforce our nation's public safety policy as set forth in Federal law. As noted above, in Sassman, the Administrative Law Judge found the exemption requirements had not been met because the complaint had been investigated and determined to be without merit, and the appeal therefrom was deemed to be a private action without government involvement.

At first blush, it is tempting to follow the rationale of Sassman and Pohl in this case, where OSHA has declined even to investigate the complaint, and conclude that, at most, the Department is providing a forum for a private appeal of an agency's procedural decision. This would seem to follow from a rationale, suggested in several of the cases cited above, that it is important to have the right procedural posture to apply the provisions of Section 362(b)(4), i.e., evidence of active involvement of the governmental entity charged with enforcement of AIR 21's whistleblower provisions. But I am persuaded that the better view is the one suggested by Judge Etchingham's alternative finding in Briggs that DOL has exclusive jurisdiction to administer, investigate, adjudicate, and settle all AIR 21 cases, and OSHA's amicus brief in Hafer, which asserts that the entire process of an AIR 21 whistleblower administrative proceeding, from beginning to end, involves the exercise of the Secretary's police and regulatory authority to enforce the pertinent provisions of AIR 21. The exercise of "police or regulatory power" in AIR 21 cases involves an administrative process, which has numerous procedural stages. The whistleblower provisions of AIR 21 have important public safety policy implications, and the use of an administrative process to investigate, adjudicate and finally decide complaints brought under its provisions necessarily involves investigations, interim decisions, and appeals from those decisions. It makes perfectly good sense and is consistent with the intent of AIR 21 and the U.S. Bankruptcy Code to construe the full administrative process in AIR 21 whistleblower cases as the vehicle by which the Secretary of the Department of Labor exercises her police and regulatory powers under that statute. Therefore, the exception to the automatic stay provisions of the Bankruptcy Code at Section 362(b)(4) would apply at any stage of that process up

until a final decision is rendered.

If it were otherwise, one would have to conduct a necessarily subjective analysis as to how much involvement of the agency was enough to trigger the exception to the automatic stay provisions. Would it be enough that there was an OSHA investigation? Or would a meritorious initial decision be required? Would it be necessary to get in the door and survive an initial dismissal motion? Would it be necessary for the Secretary to enter an appearance? Surely, this is not what was intended by Congress in enacting the exception provisions to the automatic stay. Viewing the entire process as involving the exercise by the agency of its police and regulatory power will allow the application of uniform and consistent reasoning to the myriad of procedural decisions that are a necessary part of an administrative process, and honor the important public policy considerations underlying both AIR 21 and the U.S. Bankruptcy Code.

Accordingly, I find that the exemption to the automatic stay provisions contained in Section 362(b)(4) does apply to this proceeding at this or any stage between the initiation of the complaint and a final decision because this administrative proceeding is the vehicle by which the Secretary of the Labor enforces her police and regulatory power under the provisions of AIR 21. The Respondent's alternative application to stay all proceedings pursuant to the automatic stay provisions of the Federal Bankruptcy Code is denied.

The motion to dismiss

The motion to dismiss is also denied. The Complainant has raised sufficient facts in his affidavit to warrant exploration in a hearing of issues surrounding his contacts with the FAA in order to determine whether equitable tolling principles may be invoked to excuse an untimely filing. While Respondent argues that none of the three situations in Ilgenfritz are met by these facts, the Complainant has alleged in his affidavit that he reported to the FAA that he believed his firing to have been retaliatory, which may constitute the precise statutory claim in issue here. In its Reply, Respondent fails to address Complainant's assertion in paragraph 4 of his affidavit that "Subsequent to my termination, on August 8, 2000, I spoke with Art Ricca [of the FAA] informing him of my firing and my belief that I had been fired due to my reporting of safety concerns to the FAA and to United Airlines. I asked him if we needed to report these events to other federal authorities. He said no further report was required." Instead, Respondent focuses on the correspondence attached to Complainant's affidavit and argues that this correspondence does not evidence the filing of a complaint of retaliation in the wrong forum. Complainant did not assert that the attached correspondence demonstrates that he filed his complaint in the wrong forum, but rather that the attached correspondence supports his assertion in paragraph 4 of his affidavit. I find that this assertion with supporting documents raises a genuine issue of material fact as to whether the Complainant mistakenly filed the precise statutory claim in the wrong forum.

In addition, the cases relied upon by the Respondent in its Reply do not compel the dismissal of this case before the formal hearing. In Tierney v. Sun-Re Cheese, Inc., ARB Case No. 00-052, 2001 WL 328135 (ARB March 22, 2001), the ARB affirmed a decision of the administrative law judge to dismiss the claim after a formal hearing because the complainant's testimony and pleadings

did not demonstrate that he mistakenly filed the precise statutory claim in the wrong forum. As Mr. Williams has not yet been given an opportunity to present testimonial evidence at a hearing to support his assertion, I find that Tierney does not support the dismissal of this case at the summary decision stage. In Rockefeller v. Carlsbad Area Office, U.S. Dept of Energy, ARB Case No.'s 99-002, 99-063, 99-067, 99-068, 2000 WL 1682965 (ARB Oct. 31, 2000), the ARB determined that equitable tolling was not applicable because the complainant had failed to submit either a copy of an alleged written complaint filed with the wrong forum or an affidavit attesting to the nature of the complaint filed. Despite Respondent's arguments, what is clear in the instant case is that there are facts in dispute that viewed one way or the other might affect the ultimate decision whether the complaint is viable, given the admittedly late filing. Dismissal would be improper in these circumstances.

It is so ORDERED.

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WILLIAM J. COWAN
Administrative Law Judge

Boston, Massachusetts
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